SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-963

BBF LIQUIDATING, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 28, 1972

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No.

BBF LIQUIDATING, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, BBF Liquidating, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in this cause on October 14, 1971.

Opinions Below

The District Court for the Central District of California granted Petitioner's motion to dismiss the indictment and rendered no written opinion thereon. The per curiam opinion of the Court of Appeals for the Ninth Circuit reversing has not been officially reported. It is reprinted herein as Appendix A. (App. 19.) Petitioner has also reprinted in Appendix A the per curiam opinion of the Court of Appeals for the Ninth Circuit denying its petition for rehearing in banc. (App. 20.)

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 14, 1971. Petitioner filed a Petition for Rehearing in Banc on November 8, 1971. Such Petition was denied on November 29, 1971. On December 22, 1971, the Honorable William O. Douglas extended the time for filing this Petition to and including January 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether Petitioner, a California corporation which was liquidated and dissolved prior to the institution of any proceeding leading to its subsequent indictment for an alleged violation of Section 1 of the Sherman Act, can be deemed an existing "person" within the meaning of Sections 1 and 8 of the Sherman Act so that it could be validly indicted under Section 1?

Statutes Involved

The statutes involved are Sections 1 and 8 of the Sherman Act (15 U.S.C. §§1, 7), and Sections 5400 and 5401 of the California Corporations Code, Cal. Corp. Code §§5400, 5401 (West 1955). Each of the foregoing statutes are set forth in Appendix B hereto. (App. 21-22.)

Statement of the Case

Petitioner, BBF Liquidating, Inc. (hereinafter "BBF"), was one of four corporations indicted on May 26, 1970, in Los Angeles, California for an alleged violation of Section

1 of the Sherman Act.[1] The jurisdiction of the United States District Court for the Central District of California was invoked under 18 U.S.C. § 3231.

Prior to November 27, 1968, BBF was engaged in the business of manufacturing and selling certain snack foods (such as potato chips and corn chips) in California, Nevada and Arizona.[2] Pursuant to the terms of an acquisition agreement among BBF, Sunshine Biscuits, Inc., and others dated November 8, 1968, BBF transferred all of its operating assets to a subsidiary of Sunshine Biscuits, Inc., on November 27, 1968. (R. 24, ¶ 3.)[3] Subsequent to that date, BBF has not conducted any business. (TR 12.)

In return for the transfer of its operating assets, BBF received certain shares of the common stock of American Brands, Inc., the parent company of Sunshine Biscuits, Inc. On or before January 24, 1969, BBF distributed its assets, including the American Brands common stock, to its shareholders in liquidation; and, on January 28, 1969, BBF was dissolved under California law. (R. 24-25, ¶ 5-6.) As a result of the acquisition, Sunshine Biscuits, Inc., obtained 100% control over BBF's operating assets and BBF's shareholders retained no further interest in these assets.

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1. The other defendants, Frito-Lay, Inc., Granny Goose Foods, Inc., and Pet, Inc., later pleaded *nolo contendere* and were fined. These parties have not been named in this Petition and it is petitioner's belief that these parties have no interest in the outcome of this case before this Court.

2. Prior to November 27, 1968, BBF transacted business under the name of Bell Brand Foods, Ltd.

3. Reference to pages of the Record filed in the Circuit Court of Appeals for the Ninth Circuit and certified to this Court by the Clerk of the Circuit Court will be designated by "R" followed by the appropriate page numbers, and the Supplemental Record, consisting of the reporter's transcript of proceedings before the District Court, will be designated by "TR" followed by the appropriate page numbers. Reference to the other materials certified to this Court will be specifically identified.

BBF's dissolution was effected prior to the impaneling of the federal grand jury in April 1969, and more than one year prior to the return of the indictment on May 26, 1970. At no time prior to BBF's dissolution did its management or shareholders have any knowledge that criminal proceedings of any kind, including a grand jury investigation, were contemplated. (R. 25, ¶ 8.)[4]

Since the date of dissolution, all of the shareholders of BBF have either retired or are engaged in business unrelated to the snack foods industry. (R. 25, ¶ 7.)

The Proceedings Below

On October 28, 1970, following the return of the indictment, BBF filed a motion in the District Court to dismiss the indictment on the ground that it was not a "person" within the meaning of Section 8 of the Sherman Act and therefore could not be prosecuted for an alleged violation of Section 1. On November 2, 1970, the District Court granted BBF's motion from the bench and dismissed the indictment against it.

In ruling upon the motion, the District Court observed that the cases upon which Respondent relied were distinguishable in that BBF had totally discontinued its business prior to the indictment and had transferred its assets to a different ownership. (Tr. 12-13.) On November 27, 1970, Respondent filed a "Petition for Rehearing," and on December 21, 1970, the District Court denied this request.

On January 20, 1971, Respondent filed its notice of appeal to the Court of Appeals for the Ninth Circuit under 18 U.S.C. § 3731. The appeal was argued before the Honorable Richard H. Chambers and the Honorable Herbert Y. C. Choy of the Court of Appeals for the Ninth Circuit, and

4. Respondent conceded in the court below that BBF's dissolution was effected in good faith and without "foreknowledge" of the instant criminal proceeding. (Brief for Appellant [Respondent] before the Circuit Court of Appeals, at 10.)

the Honorable C. A. Muecke, District Judge. On October 14, 1971, an opinion per curiam was rendered by the Court of Appeals reversing the judgment of the District Court and holding that a dissolved California corporation can be federally indicted after dissolution. (App. 19.) A Petition for Rehearing in Banc was filed with the Court of Appeals on November 8, 1971, and was denied per curiam on November 29, 1971.

The time to file this Petition was extended to and including January 28, 1972, by the Honorable William O. Douglas on December 22, 1971.

REASONS FOR GRANTING THE WRIT

I

The decision below is in direct conflict with the decision of the Tenth Circuit Court of Appeals in *United States* v. *Safeway Stores, Inc.*, 140 F.2d 834 (10th Cir. 1944).

The only decisions ruling upon the question whether a criminal prosecution can be instituted against a dissolved California corporation, other than the lower court decisions in this case, are *United States* v. *San Diego Grocers Association, Inc.*, 177 F. Supp. 352 (S.D. Cal. 1959), and *United States* v. *Safeway Stores, Inc.*, 140 F.2d 834 (10th Cir. 1944).[5]

5. *United States* v. *Carter*, 311 F.2d 934 (6th Cir. 1963), is also in conflict with the Tenth Circuit's decision to the extent that it held a dissolved corporation may be indicted subsequent to dissolution although an Ohio statute was there involved. Other conflicting cases involving the general question of the indictment of dissolved corporations include *United States* v. *Seaboard Coast Line R.R. Co.*, 326 F. Supp. 897 (M.D. Fla. 1971), which held that a criminal prosecution could not be commenced against a dissolved Virginia corporation, and *United States* v. *Globe Chemical Co.*, 311 F. Supp. 535 (S.D. Ohio 1969) and *United States* v. *Arcos Corporation*, 234 F. Supp. 355 (N.D. Ohio 1964) which respectively held that criminal prosecutions could be commenced against corporations dissolved under Ohio and Pennsylvania law.

The decision of the Circuit Court below adhered to the district court's holding in *San Diego Grocers* that a criminal prosecution may be commenced against a dissolved California corporation. This is in direct conflict with the Tenth Circuit's decision in *Safeway* which, conversely, held that a dissolved California corporation did not continue to exist for purposes of criminal prosecutions commenced after its dissolution.

In *Safeway*, the defendant corporations were dissolved pursuant to the laws of their respective states of incorporation prior to the return of an indictment against them for alleged Sherman Act violations. Defendants moved to dismiss the indictment on the ground that no criminal prosecution could be instituted against them following their dissolutions. In assessing the effect of dissolution upon the criminal prosecution, the Tenth Circuit construed the statutes of California, Delaware, Nevada and Texas, the respective states of incorporation, to determine whether the defendants were "persons" as that word is used in Section 1 and defined in Section 8 of the Sherman Act.

The precise language of the California statute construed in *Safeway*, in pertinent part, provides:

> "A corporation which is dissolved by the expiration of its term of existence, by order of court, or otherwise, nevertheless shall continue to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, ..."[6]

Since the California courts had not ruled upon the construction of the word "actions," the Tenth Circuit focused

6. The statute construed by the court in *Safeway* was Section 399 of the California Civil Code. Three years after the *Safeway* decision, this provision was re-enacted without change as Sections 5400 and 5401 of the California Corporations Code.

its inquiry upon several cases from the states of Ohio, Pennsylvania and Massachusetts, which construed the word "actions" to include only civil litigation. The Tenth Circuit then held that the California corporate defendants did not continue to exist for purposes of criminal prosecution and that the word "actions," as used in the California statute, includes "civil actions and does not embrace criminal prosecutions." 140 F.2d at 838.

The Court of Appeals in this case, however, said that it "generally" elected to follow the District Court's decision in *United States* v. *San Diego Grocers Association, Inc.* 177 F. Supp. 352 (S.D. Cal. 1959). In *San Diego Grocers*, the district court specifically rejected *Safeway* and held that a California corporation did continue to exist under California law for purposes of criminal prosecution commenced after its dissolution.

The *San Diego Grocers* case is factually distinguishable in important respects. There, the sole owner and president of the dissolved defendant corporation, after becoming aware of the pending grand jury proceedings, caused the defendant to transfer its assets to another corporation under his control and dissolve, seemingly in an attempt to evade prosecution. In the case at bar, however, BBF was dissolved prior to the impaneling of the grand jury which ultimately returned the indictment and was not aware that any criminal proceedings were contemplated when it dissolved. Moreover, its shareholders did not retain any control over the operating assets.

The present conflict between the Ninth and Tenth Circuit Courts of Appeal has created a federal question of public importance—whether a criminal prosecution under the

Sherman Act may be commenced against a dissolved corporation in the absence of a state statute providing for the survival of state or federal criminal prosecutions.

Such a question involving an interplay of federal and state law has been deemed appropriate for consideration by this Court. As stated by Mr. Justice Douglas in *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271 (1959):

> "We have here a situation where the interplay of federal and state law makes it clear that petitioners did not escape criminal responsibility under the Sherman Act by the kind of dissolution decreed under Maryland and Delaware law." at 272.

Unlike the *Melrose* case which focused upon the question of whether an antitrust action abates against a corporation which dissolves during the pendency of the action, this case involves the question of whether the right to commence a criminal antitrust prosecution is entirely barred by the prior dissolution, where there is no possible claim of bad faith in the dissolution.

II

The Court below has decided an important question of Federal law which has not been settled by this Court.

In *Melrose Distillers, Inc.* v. *United States*, *supra*, this Court held that a pending criminal prosecution against an existing corporation could not be abated by the corporation's subsequent dissolution. This Court, however, has not ruled upon the question of whether a criminal prosecution not pending against a corporation at the time of its dissolution survives the dissolution and may thereafter be commenced.

Indeed, the policy considerations involved in the question of abatement of a pending prosecution are significantly different than those involved in the question whether the right to commence a criminal prosecution survives a corporation's dissolution.

In *Melrose*, a Delaware and a Maryland corporation, both wholly-owned subsidiaries of Schenley Industries, Inc., were indicted for alleged violations of the Sherman Act. Shortly after the indictment was returned, these corporations were dissolved under the laws of their respective states of incorporation and became separate divisions of a new wholly-owned subsidiary of Schenley. Both corporations moved to dismiss the indictment against them on the ground that their dissolutions abated the criminal prosecution.

Following an extensive analysis of the controlling Delaware and Maryland statutes, the district court held that the language of those statutes was sufficiently broad to continue the existence of the defendants for purposes of criminal prosecution. The Circuit Court of Appeals for the Fourth Circuit affirmed. This Court noted a conflict among the circuits concerning this question of abatement, granted certiorari and affirmed.[7]

The corporate defendants in *Melrose* were aware of the pending criminal prosecution prior to their respective dissolutions. The facts were further aggravated in that, after the dissolution, the business of those corporate defendants was continued under the same ownership.

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7. Although this Court did not discuss the *Safeway decision* in its opinion in *Melrose*, which reversed *sub silentio Safeway's* construction of the significantly broader Delaware survival statute, *Safeway's* construction of the California statute has not been considered by this Court.

This Court was undoubtedly concerned about permitting the evasion of criminal prosecution by voluntary dissolution, stating:

> "Policy reasons look to the same result. Petitioners were wholly owned subsidiaries of Schenley Industries, Inc. After dissolution they simply became divisions of a new corporation under the same ultimate ownership. In this situation there is no more reason for allowing them to escape criminal penalties than damages in civil suits. . . ." 359 U. S. at 274.

BBF was not aware at the time of its dissolution or prior thereto that it would subsequently be indicted and, unlike the situation in *Melrose*, BBF transferred its operating assets to an independent entity under entirely different ownership. Moreover, its shareholders divested themselves of all control over BBF's operating assets (R. 25, ¶ 7.) The complete good faith in which they acted, conceded by the Government below, precludes the use here of the policy considerations which led to the decisions in *Melrose* and *San Diego Grocers*. There is no occasion here to stretch the state statute beyond its intended ambit to permit prosecution of a dead entity without existence or assets to pursue.

As a result of the conflict which now exists between the Ninth and Tenth Circuits, and the absence of any ruling on this question by this Court, the petition for a writ of certiorari should be granted. While the question is a narrow one, it is important for the Government and defendants to know what former entities can or cannot be indicted and, as the decision below was erroneous, the indictment here should not be permitted to stand.

The Circuit Court of Appeals Erred In Holding That The California Survival Statute Conferred Sufficient "Vitality" Upon A Dissolved Corporation To Be Deemed An Existing "Person" Under The Sherman Act.

The decision of the Court of Appeals in this case is particularly significant because of the question which it decided by endorsement. In the Court of Appeals, Respondents, relying on *Melrose,* argued that, even if the California statute continued the existence of BBF after its dissolution only for purposes of civil cases, BBF still had sufficient "vitality" to be an "existing" person within the meaning of Sections 1 and 8 of the Sherman Act. (Brief for Appellant [Respondent] before the Court of Appeals, at 12, *et seq.*)

Although the Court of Appeals did not expressly discuss this question, it chose "generally" to follow the case of *United States* v. *San Diego Grocers Association, Inc.,* 177 F.Supp. 352 (S.D. Cal. 1959). In *San Diego Grocers,* the district court affirmatively stated that a federal criminal prosecution under the Sherman Act would not be barred even if the California survival statute continued the existence of a dissolved corporation only for the purpose of prosecuting and defending civil actions. 177 F.Supp. at 354.

The question is of extreme public importance since it involves the determination of whether the federal government should be permitted to prosecute a corporation dissolved under State law when that State has decided that no prosecution, federal or state, should be permitted.[8]

8. This is significantly different than the question of whether a State can continue the existence of a dissolved corporation solely for purposes of state prosecution while immunizing it for purposes of federal criminal prosecution. See, *Alamo Fence Company of Houston* v. *United States,* 240 F.2d 179, 183 (5th Cir. 1957).

This question clearly could affect dissolved corporations in the many states where they are continued in existence for any purpose. As evidenced by the conduct in the case at bar and in the several cases cited in footnote 5, *supra*, Respondent apparently intends to continue to institute such criminal proceedings against dissolved corporations generally. Until such time as this question is decided, dissolved corporations will be forced to defend such prosecutions and continue to challenge the Government's theory on this issue. More specifically, corporations dissolved under California law will continue to be buffeted by the conflict here until this Court resolves it.

Assuming, as BBF contends,[9] Section 5400 of the California Corporations Code (generically referred to as the California survival statute), continues the existence of a dissolved corporation solely for purposes of civil litigation, the question which this Court should resolve is whether such a limited existence is sufficient to render the dissolved corporation subject to criminal prosecution under the Sherman Act.

There is no question that a corporation, at common law, ceased to exist for any purpose upon its dissolution in accordance with the laws of its state of incorporation. *Melrose Distillers, Inc.* v. *United States, supra*, at 272. This common law rule, however, often operated to the detriment of both creditors and shareholders of the dissolved corporation by cutting off all claims by or against that corporation. See, *United States* v. *Cigarette Merchandisers Assn., Inc.*, 136 F. Supp. 214, 215 (S.D.N.Y. 1955) (the purpose of keeping a corporation in existence for certain purposes after its dissolution is "to ameliorate the unjust and harsh results to creditors and stockholders alike if the strict common law doctrine of corporate death and abatement were applied").

Accordingly, most jurisdictions, including California, have enacted statutes that continue the existence of dis-

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9. See p. 14, et seq., *infra*.

solved corporations in order to permit each such corporation to enforce its inchoate claims for the benefit of its shareholders. Under these statutes, any person damaged by a corporation may enforce his claim subsequent to the corporation's dissolution. See, *Bank of Alameda County* v. *McColgan*, 69 Cal. App. 2d 464, 471 (1945) (the survival statute[10] is "for the protection of both the corporation and the public. A way is set up to protect creditors. . . .".)

The purpose of a criminal prosecution is achieved by the imposition of a penalty. In California, and in most jurisdictions, the assets of a dissolved corporation which are distributed to its shareholders remain subject to an equitable charge for the debts of the corporation. See, Cal. Corp. Code § 5012 (West 1955); *Trubowitch* v. *Riverbank Canning Co.*, 30 Cal. 2d 335, 345 (1947).

Thus, if criminal liability is established against a dissolved corporation which has distributed all of its assets in dissolution and a fine is imposed, the shareholders of that corporation will be liable for the payment of a fine to the extent of their respective distributive shares. Since a criminal fine imposed against a dissolved corporation would have to be paid from the assets distributed to the shareholders, the ability of creditors or other persons to satisfy their claims would be impaired to the extent that such assets were thereby reduced.

The institution of criminal charges against a dissolved corporation serves no useful purpose. Such a corporation clearly has no capacity to commit a crime and its prosecution is not necessary to deter it from future unlawful conduct. Just as the imposition of a criminal fine against the estate of an individual would have the undesirable result

10. Former Section 399 was before the Court.

of punishing that individual's heirs, the imposition of a criminal fine against a dissolved corporation would result in the punishment of its non-management shareholders for a crime committed by the corporation and its management, even though such shareholders were not parties to that prosecution and were not charged with any wrongdoing.

Under California Law No State or Federal Criminal Prosecution May Be Commenced Against A Dissolved Corporation.

Unlike other jurisdictions whose statutes refer to "actions, suits or proceedings" which must be commenced within a specified period of time,[11] California has chosen not to go any further than necessary in abrogating the common law principles of abatement and survival for the protection of creditors and shareholders. BBF respectfully submits that this Court should hold that a criminal prosecution may not be commenced against a California corporation after its dissolution, certainly where the dissolution was effected without any knowledge of the likelihood of prosecution.

The legislative history of the California survival statute, Section 5400 of the California Corporations Code, requires the conclusion that the statute does not, and was not intended to, continue the existence of a dissolved corporation for purposes of a criminal prosecution instituted after dissolution.

The language of Section 5400 is clearly much narrower than the language of comparable statutes in other jurisdictions. For example, while Section 5400 provides that a dissolved California corporation continues to exist for the pur-

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11. See, *e.g.* Delaware General Corporation Law § 278, 8 Del. C. § 278 at p. 15, *infra*.

pose of prosecuting and defending "actions" by or against it, the analogous Delaware statute provides:

> ". . . with respect to any *action, suit, or proceeding* begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such *actions, suits or proceedings*, so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed." 8 Del. C. § 278 (emphasis supplied).

In contrast to the plethora of cases cited by Respondent in its brief in the Court of Appeals construing the word "proceedings" to embrace criminal prosecutions, the cases construing the word "actions," with the single exception of *San Diego Grocers*, have consistently held that it includes only civil litigation. *United States* v. *Safeway Stores, Inc., supra*, 140 F.2d at 838-39, and the cases cited therein: See also, *United States* v. *P. F. Collier & Son Corp.*, 208 F.2d 936, 939 (7th Cir. 1953) ("the word 'action' standing alone might reasonably be held as not including a criminal prosecution. . . .").

The legislative re-enactment of the California survival statute also supports this construction. Just three years after the Tenth Circuit's decision in *Safeway*, the California legislature re-enacted Section 399 of the California Civil Code without change as Sections 5400 and 5401 of the Corporations Code. Since it is the regular practice of the legal staff of the California legislature (The Legislative Counsel), to review the existing law in connection with areas of proposed legislative enactments, the legislature was undoubtedly aware of the Tenth Circuit's construction of Section 399 when it enacted Section 5400.

A legislature which re-enacts a statute without change is presumed to have adopted the existing judicial construction thereof. *Bishop* v. *City of San Jose*, 1 Cal. 3d 56, 65

(1969) ("statutes are to be interpreted by assuming that the legislature was aware of the existing judicial decisions"). See also, *Jensen v. Traders & General Ins. Co.*, 52 Cal. 2d 786, 797 (1959). If the legislature had disagreed with the Tenth Circuit's construction of Section 5400 in *Safeway*, it surely would have amended that Section to expressly include criminal prosecutions.

Nevertheless, the district court in *United States v. San Diego Grocers Association, Inc., supra*, construing the word "actions" in Section 5400 to include criminal prosecutions, relied on Sections 22 and 24 of the California Code of Civil Procedure which define the word "action" to include criminal prosecutions. However, nowhere in the history of Section 5400 does it appear that the legislature considered these two provisions, enacted in 1872, when it enacted Section 399 and, later, Section 5400 as part of two entirely different codes—the Civil Code and the Corporations Code. In view of the fact that Section 399 and Section 5400 were both enacted more than half-a-century after the 1872 definition, it is unlikely that the legislature was mindful of these provisions when it again used the word "actions" in Section 5400.

A comparision of Section 5400 with Section 5401, California's abatement statute, clearly illustrates the limited scope of Section 5400. Section 5401 provides that "no [pending] action *or proceeding* to which a corporation is a party abates by the dissolution of the corporation. . . ." (Emphasis added.) By including the words "or proceeding" in Section 5401, the California legislature provided that a pending criminal prosecution against a corporation would not abate by reason of its dissolution.

Even if the 1872 provisions were to be considered, however, they should not be regarded as controlling. It would

be improper to treat Section 5400 as incorporating a term dealing only with abatement and to do so would make the language of Section 5401 superfluous—an egregious result which is unacceptable. This would also run afoul of another basic maxim of statutory construction—" . . . that effect must be given if possible to all words and parts of a statute so that none will be insignificant or meaningless." *Technicolor Motion Picture Corp.* v. *Westover,* 202 F.2d 224, 228 (9th Cir. 1953). See also, *Cal. Pacific Collections, Inc.* v. *Powers,* 70 Cal. 2d 135, 139 (1969).

BBF respectfully submits that the Ninth Circuit's construction of Section 5400 of the California Corporations Code holding that a dissolved California corporation may be subsequently indicted under Section 1 of the Sherman Act was in error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in this cause on October 14, 1971.

Respectfully submitted,

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January 28, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 71-1360

UNITED STATES OF AMERICA,
Appellant,

vs.

BBF LIQUIDATING, INC.,
Appellee.

[October 14, 1971]

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and CHOY, Circuit Judges, and MUECKE,* District Judge.

PER CURIAM:

The order dismissing the indictment against BBF Liquidating, Inc. is reversed. The district court is directed to reinstate the indictment.

The question is whether a dissolved California corporation can be federally indicted after dissolution. Here the district court seems to have followed United States *v.* Safeway Stores, Inc., 10 Cir., 140 F.2d 834.

However, generally we elect to follow United States *v.* San Diego Grocers Association, Inc., S.D. Cal., 177 F. Supp. 352, which reaches an opposite result from Safeway, supra.

We take San Diego Grocers Association to be a holding that a dissolved California corporation has the same vitality for all criminal prosecutions as it does for civil actions.

* The Honorable C. A. Muecke, United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 71-1360

UNITED STATES OF AMERICA,
Appellant,

vs.

BBF LIQUIDATING, INC.,
Appellee.

Before: CHAMBERS and CHOY, Circuit Judges, and MUECKE, District Judge.

PER CURIAM:

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The suggestion for a rehearing en banc has been passed to all active judges of the Court and none has requested a rehearing en banc.

APPENDIX B

Section 1 of the Sherman Act, 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 8 of the Sherman Act, 15 U.S.C. § 7

The word "person", or "persons", wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SECTION 5400, California Corporation Code

A corporation which is dissolved by the expiration of its term of existence, by forfeiture of existence by order of court, or otherwise, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof. (Stats. 1947, c. 1038, p. 2399, § 5400.)

SECTION 5401, California Corporation Code

No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for dissolution and winding up thereof. (Stats. 1947, c. 1038, p. 2399, § 5401.)

SECTION 22, California Code of Civil Procedure

An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. (Enacted 1872. As amended Stats. 1933, c. 742, p. 1805, § 2.)

SECTION 24, California Code of Civil Procedure

DIVISIONS OF ACTIONS. Actions are of two kinds:

1. Civil; and,

2. Criminal. (Enacted 1872.)

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

BBF LIQUIDATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-19) is reported at 450 F.2d 938. The district court did not render a written opinion.

JURISDICTION

The court of appeals entered its judgment on October 14, 1971 (Pet. 19), and denied a petition for rehearing and suggestion for rehearing *en banc* on November 29, 1971 (Pet. App. A 20). On December 22, 1971, Mr. Justice Douglas extended the time for filing

a petition for a writ of certiorari to January 28, 1972; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a California corporation, which was dissolved prior to being indicted for violating Section 1 of the Sherman Act, is an "existing" corporation within the meaning of Section 8 of the Sherman Act and therefore still liable to prosecution for acts committed before dissolution.

STATUTES INVOLVED

Section 8 of the Sherman Act, 15 U.S.C. 7, provides:

> The word "person" * * * shall be deemed to include corporations * * * existing under * * * the laws of any State * * *.

Sections 5400 and 5401 of the California Corporations Code, and Sections 22-24 of the California Code of Civil Procedure, are set forth at App., *infra*, pp. 11-12.

STATEMENT

Petitioner, BBF Liquidating, Inc. ("BBF"), is a California corporation. Under the name Bell Brand Foods, Ltd., BBF formerly engaged in the production and sale of snack foods. On November 8, 1968, Sunshine Biscuits, Inc., agreed to acquire substantially all the assets of Bell Brand Foods. Bell Brand Foods ceased doing business on November 26, 1968, changed its name to BBF Liquidating, Inc., on December 16, and filed a Certificate of Winding Up and Dissolution on January 24, 1969. All of the assets that BBF re-

ceived from Sunshine in exchange for its own assets, and all of the assets that were not exchanged, were distributed to, or for the benefit of, BBF's shareholders on or prior to January 24, 1969 (R. 9-10).[1]

On May 26, 1970, an indictment was returned charging BBF Liquidating, and others, with conspiring to fix the prices of snack foods in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. BBF's dissolution occurred before the grand jury's investigation into the alleged price fixing, and BBF did not undergo dissolution with the intention of avoiding criminal liabilty.

BBF moved to dismiss the indictment on the ground that since it had been dissolved prior to indictment, it was not liable to criminal prosecution (R. 7).[2] The district court granted this motion (R. 53) without rendering a written opinion, and the government appealed.

The court of appeals reversed, *per curiam*, holding that "a dissolved California corporation has the same vitality for all criminal prosecutions as it does for civil actions," and is therefore amenable to a Sherman Act prosecution based on acts committed prior to its dissolution (Pet. App. A 19). Accordingly, the court of appeals directed the district court to reinstate the indictment (*id.*).

ARGUMENT

1. Petitioner alleges a conflict between the court of appeals in this case and the court of appeals in *United*

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[1] "R." refers to the record in the case in the court of appeals.

[2] The other defendants, Frito-Lay, Inc., Granny Goose Foods, Inc., and Pet, Inc., later pleaded *nolo contendere* and were fined $35,000 each.

States v. *Safeway Stores, Inc.*, 140 F.2d 834 (C.A. 10). The differences between those courts relate only to interpretation of California law for the purpose of determining whether a Sherman Act prosecution should be abated. In our view the decision below is correct and there is no conflict warranting review by this Court. Subsequent decisions have undermined the rationale and approach of *Safeway Stores* so that today it appears that not even the Tenth Circuit would follow that decision.

Section 8 of the Sherman Act, 15 U.S.C. 7, provides that a "person" liable to prosecution under the Sherman Act includes a corporation "existing under * * * the laws of any State * * *." Accordingly, whether BBF, as a corporation dissolved prior to indictment, still "exists" for purposes of a Sherman Act prosecution, depends upon state law. *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271, 272.

BBF is a California corporation. California law provides that a dissolved corporation continues in existence for the purpose of collecting and discharging obligations, and for prosecuting and defending "actions" by or against it. Cal. Corp. Code § 5490. In California, an "action" is "an ordinary proceeding in a court of justice by which one party prosecutes another for * * * the punishment of a public offense"; there are two types of "actions"—civil and criminal. Cal. Code Civ. Pro. §§ 22, 24. Thus, a dissolved California corporation, under California law, continues to "exist" for the purpose of defending criminal "actions" and Section 8 of the Sherman Act renders such corporations subject to prosecution under that Act.

Aside from the instant case, the only decisions dealing with the question whether "action" as used in Section 5400 of the California Corporations Code includes criminal actions are *Safeway Stores*, *supra*, and *United States* v. *San Diego Grocers Ass'n, Inc.*, 177 F. Supp. 352 (S.D. Cal.). In *Safeway Stores*, the Tenth Circuit held that "action" did not include a criminal prosecution, but the court apparently overlooked Section 24 of the California Code of Civil Procedure, which defines "action" to include both civil and criminal proceedings. In *San Diego Grocers*, however, the court examined Section 5400 of the Corporations Code and Section 22 and 24 of the Code of Civil Procedure, and concluded that "the statutes of the state of California clearly established that the word 'action' is used to include criminal as well as civil prosecutions." 177 F. Supp. at 354.

San Diego Grocers thus represents a more thorough analysis of the question in light of the statutes of California. For this reason the Court of Appeals for the Ninth Circuit in this case followed *San Diego Grocers* rather than *Safeway Stores* in concluding that a "dissolved California corporation has the same vitality for all criminal prosecutions as it does for civil actions" (Pet. App. A 19). The Ninth Circuit, of course, has a special familiarity with California law and its decision is correct.[3]

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[3] Although the United States believes that this Sherman Act prosecution could be maintained even if dissolved California corporations were continued in existence solely for civil actions, but not for criminal actions, the court below never reached this issue. Thus, contrary to petitioner's assertion, this issue is not presented by this case (see Pet. 7-8, 11-14).

Moreover, there is substantial doubt about the continuing validity of *Safeway Stores* even in the Tenth Circuit and it appears that only the occasion is needed to pronounce its complete demise.[1] That court's subsequent decision in *United States* v. *United States Vanadium Corp.*, 230 F.2d 646, 649-650 (C.A. 10), involved a New York statute containing provisions nearly identical to the California ones the court had overlooked in *Safeway Stores*. In *Vanadium* the court held that "action" embraced both civil and criminal proceedings and that a dissolved corporation was therefore subject to criminal prosecution.

2. Contrary to petitioner's assertion (Pet. 8), this case does not involve an important question of federal law. *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271, settled the law in this area. That case involved

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[1] Other courts have consistently refused to follow the narrow approach of *Safeway Stores*. See *United States* v. *Carter*, 311 F.2d 934 (C.A. 6) (Taft-Hartley Act); *United States* v. *P. F. Collier & Son Corp.*, 208 F.2d 936 (C.A. 7) (Fair Labor Standards Act); *United States* v. *Globe Chemical Co.*, 311 F. Supp. 535 (S.D. Ohio); *United States* v. *Arcos Corp.*, 234 F. Supp. 355 (N.D. Ohio); *United States* v. *Anaconda American Brass Co.*, 210 F. Supp. 873 (D. Conn.); *United States* v. *Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 214 (S.D.N.Y.).

Furthermore, in *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271, decided after *Safeway Stores*, this Court granted certiorari to resolve a conflict among the circuits over Delaware's dissolution statute. The Court cited (359 U.S. at 272 n. 1), as illustrative of the conflict, *United States* v. *Line Material Co.*, 202 F.2d 929 (C.A. 6), which relied heavily on *Safeway Stores* for a narrow construction of Delaware law. *Melrose* rejected this view of state dissolution statutes in Sherman Act cases, see 359 U.S. at 273-274. *Melrose* thus implicitly, if not explicitly, rejected the narrow reading of state law exemplified by *Safeway Stores*.

two corporations dissolved under the laws of Delaware and Maryland, respectively, after they had been indicted for violating the Sherman Act. The Court examined the statutes of the two states and held that in each case state law implied "enough vitality to make the corporation an 'existing' enterprise for the purposes of § 8 of the Sherman Act." 359 U.S. at 273. Similarly, the court below held that BBF, as a dissolved California corporation, has the "vitality" to make it amenable to this Sherman Act prosecution (Pet. App. A 19).

Petitioner suggests that this case differs from *Melrose* because BBF's dissolution occurred prior to indictment, and in good faith, while in *Melrose* the dissolutions occurred after indictment, with the corporate assets remaining under the same ultimate ownership (see Pet. 8-10). *Melrose*, however, in no way indicates that the result depends upon the timing of the dissolution. California law likewise does not indicate that good faith dissolution is to be treated any differently than dissolution undertaken to avoid liability. The California statute continues the corporate existence for certain purposes, without regard to the motive for dissolution.[5]

Sound considerations of policy counsel that the deterrent effect of criminal law not vary with the timing of dissolution. Whatever form the dissolution takes—whether rearrangement of corporate structure after

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[5] Petitioner has not cited, nor have we found, any case in which the good faith nature of the dissolution barred a Sherman Act prosecution. Compare *United States* v. *Arcos Corp.*, 234 F. Supp. 355, 358 (N.D. Ohio).

indictment, as in *Melrose*, or before indictment, as in *San Diego Grocers*, or even transfer of assets before the grand jury investigation—the fact remains that the corporation has been charged with wrongdoing committed while it carried on its operations. No matter what has happened to the assets after the criminal violation, the corporation and its shareholders have already benefited from the corporate illegality. So long as the corporation retains an existence to pay its debts, as dissolved California corporations do under Section 5400 of the Corporations Code, there is no reason to bar the payment of a criminal fine. As the Court noted in *Melrose*, "a corporation cannot be sent to jail. The discharge of its liabilities whether criminal or civil can be effected only by the payment of money." 359 U.S. at 274.[6] If BBF committed the offenses charged while it was still doing business, its shareholders should not retain the fruits of the illegalities simply because the corporation dissolved before the government commenced prosecution.

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[6] BBF itself recognizes that it can be held liable for any civil damages it may have caused as a result of its alleged price-fixing activities; in excess of twenty-five such private treble-damage actions have already been filed (Br. for Appellee in the Court of Appeals, p. 20).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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